Frank Black Mechanical Services, Inc. *and* Harrisburg and Central Pennsylvania Building and Construction Trades Council. Cases 4-CA-12447 and 4-RC-14796

31 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 27 September 1982 Administrative Law Judge John H. West issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions, and the Respondent filed cross-exceptions and a supporting brief and a brief in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Frank Black Mechanical Services, Inc., Carlisle, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Remove from its files any reference to the unlawful layoffs and notify the employees in writing that this has been done and that the layoffs will not be used against them in any way."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate employees about their union activities or sympathies.

WE WILL NOT threaten employees with discharge because of their interest in or activity on behalf of the Union.

WE WILL NOT threaten to close the plant because of employees' interest in or activity on behalf of the Union.

WE WILL NOT coercively interrogate employees about the union activities or sympathies of their fellow employees.

WE WILL NOT grant raises or improve the conditions of employment of our employees in order to dissuade employees from supporting the Union.

WE WILL NOT solicit grievances and imply that such grievances will be remedied in order to influence employees against selecting the Union as their bargaining representative.

WE WILL NOT coercively attempt to induce an employee to attempt to discourage other employees from supporting the Union.

WE WILL NOT create an impression among our employees that their union activities were under surveillance by informing them that we were aware of the names of the employees who voted for the Union.

WE WILL NOT refuse, upon request, to bargain with the Union as the exclusive collective-bargaining representative of the bargaining unit of our employees.

WE WILL NOT lay off employees because of their union activity and to discourage employees' interest and membership in the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain with Harrisburg and Central Pennsylvania Building and Construction Trades Council as the exclusive collective-bargaining representative of a majority

[1] Chairman Dotson would find, contrary to the judge, that it is not a violation of Sec. 8(a)(1) of the Act for an employer to request that an employee attempt to dissuade other employees to vote against the union. The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find totally without merit the Respondent's allegations of bias and prejudice on the part of the judge.

[2] In stating that *Wright Line*, 251 NLRB 1083 (1980), does not apply here because this is a pretext case, we believe the judge meant to say that it is unnecessary in cases such as this one to formally apply the analysis set forth in that decision because "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981). It is clear, however, that the Board's *Wright Line* analysis applies to all 8(a)(3) and (1) discharge cases regardless of the Board's ultimate conclusion as to motive. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[3] We shall require the Respondent to expunge from its records any reference to the unlawful layoffs of employees Baer, Hench, Reapsome, and Winters. *Sterling Sugars*, 261 NLRB 472 (1982).

of the employees in a unit appropriate for collective bargaining with respect to wages, hours, and other terms and conditions of employment and will, if an agreement is reached, embody same in a written, signed contract. The appropriate bargaining unit is:

> All plumbers, pipefitters, sheet metal workers, electricians, operating engineers, asbestos workers, laborers and service employees employed by the Employer but excluding all office clericals, stockroom personnel, salesmen, estimators, guards and supervisors as defined in the Act.

WE WILL give backpay with interest to (a) Charles Baer for the time of his unlawful layoff from August 6 to December 1981, and (b) Kirk Hench, Jed Reapsome, and David Winters for the time of their unlawful layoffs from 28 August to December 1981.

WE WILL notify each of the above employees that we have removed from our files any reference to his layoff and that the layoff will not be used against him in any way.

FRANK BLACK MECHANICAL SERVICES, INC.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. The charge in Case 4–CA–12447 was filed by Harrisburg and Central Pennsylvania Building and Construction Trades Council (Union) on October 1, 1981.[1] A complaint was issued on November 13 alleging that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), in that assertedly it interrogated employees, solicited their complaints and grievances, created an impression of surveillance among its employees, increased the benefits of an employee by granting him a wage increase, improved the conditions of employment for one of its employees, threatened to close its facility, threatened its employees with discharge, discharged four employees, and refused the Union's request of July 28 for recognition and collective bargaining with it as the exclusive representative of a specified unit of Respondent's employees. Respondent filed an answer denying all of these allegations, except that Respondent admitted that on or about July 23, Donald Lyons, its vice president, (1) "made inquiries [of employees] as to the general nature of the Union activity [and sympathies] of fellow employees; he did not inquire as to the activities [or sympathies] of any specific fellow employee," and (2) he interrogated employees regarding their union activities.[2] General Counsel's Exhibit 1(e). Respondent also admitted that a specified group of its employees constitute an appropriate collective-bargaining unit;[3] that the Union did request recognition; and that it has refused to recognize and bargain with the Union.

By order entered March 26, 1982, Case 4–CA–12447 was consolidated with Case 4–RC–14796 which involves objections filed on October 1 by the Union to conduct which allegedly affected the results of an election held on September 24 at Respondent's Carlisle, Pennsylvania facility. The objections, described more fully infra, involve the same matters alleged in the above-described complaint.

A hearing on these consolidated cases was held before me in Lancaster, Pennsylvania, on April 14–16, 1982, and on May 3, 1982. On the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Pennsylvania corporation, is a mechanical contractor engaged in the construction business. The complaint alleges, the Respondent admits, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent was organized in 1968 when it was severed from Frank Black Incorporated. At that time it had five service employees. By 1979 or 1980 it had between 100 and 120 employees.[4] One of Respondent's employees, Kirk Hench, spoke with Larry Collins, an employee of the Union, in the spring of 1980. In conversations which took place over the next year, the two discussed what the Union had to offer and the possibility of organizing Respondent's employees.

In the spring of 1981, Collins met with Hench and three other of Respondent's employees, Charles Baer, David Winters, and Jed Reapsome. These four employees formed an organizing committee and determined which of Respondent's employees were then invited to attend the approximately 10 meetings which were held at the union headquarters in Cumberland, Pennsylvania, beginning in May and continuing over the next few

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[1] All dates are 1981 unless otherwise stated.

[2] Respondent, in addition to admitting that Lyons is its vice president, also admitted that Denver Tuckey is its president and James Herley is a supervisor who, along with Tuckey and Lyons, are supervisors within the meaning of the Act.

[3] The unit is as follows:

> All plumbers, pipefitters, sheetmetal workers, electricians, operating engineers, asbestos workers, laborers and service employees employed by Respondent but excluding all office clericals, stockroom personnel, salesmen, estimators, guards and supervisors as defined in the Act.

[4] Respondent was merged with L. B. Sheetmetal in March 1980. At the time of the merger, Respondent had 75 employees and L. B. Sheetmetal employed about 35 people. The latter company was separated from Respondent in May 1981.

months. Each of these four employees attended all or most of the meetings.[5] And each obtained signatures on between two and four union authorization cards.[6]

At approximately 11 a.m. on July 24, Lyons came to the Carlisle Tire and Rubber jobsite and spoke to the job foreman, Hench, and Winters at the same time.[7] The conversation lasted 2 hours. All three testified, with little if any real disagreement, about its content. When Lyons came to the jobsite he asked the two employees to step outside. Then, as credibly testified to by Winters:

> Don [Lyons] said, I'm not one to beat around the bush so I'll come right to the point. And he said that he'd already been to some other jobs so he knew pretty much what he was talking about and said that the night before he heard from a fellow that used to work for the company that a union was trying to get in and he just wanted to know what we knew about it.
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> And I said, "Yeah, I guess you're right, Don." And he said, "What's the problem? Why aren't you satisfied with what we give you?" And I said I can't make it on the money that I get.
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> Then he asked Kirk how he felt, and Kirk said that he liked the schooling and the pension plan that the union had to offer. And Don said, "Well you'd better look into that schooling because there's a lot of guys with families that won't want to go to school at night."
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> And then he asked if those were our only grievances, and I said that I didn't like his nephew working scale jobs when there were men with families and bills that could be working them instead of a college student there for the summer.
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> . . . .
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> . . . And Kirk said that in the past five years that he's been working for the company he'd be lucky if he got two weeks scale, and there were some guys that got scale jobs all the time.
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> And Don said, well there's scheduling problems and he really wasn't too pleased that we would be talking behind his back out in the parking lot or on the jobsite, wherever, and said that we should have come to him or Denver and asked to see a union representative instead of sneaking behind his back like we were doing.
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> And I said that I really didn't think we were sneaking behind his back. And the conversation went on, and he asked if everybody in the company was aware of what was going on, and we said yeah. And then he started to go through a list of the employees, asked how do the plumbers feel? and I said about half were interested and about half weren't. And then he asked how the sheetmetal men felt, and I said one is for it and one is against it. And then he asked how the electricians felt. [At that time Respondent employed an electrician.] and I said Don, everybody is just really interested in what the union has to say. We're all there just to hear what they have to say.
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> And he said, "Well, you'd better make sure that everybody is aware of what they're going to be doing." And a little farther on in the conversation he came out and asked who the union representatives were, and Kirk told him that nobody was really, that we were all just looking to see what we could get from the union.
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> And he said, somebody must at least make phone calls to the union. And I said well I guess I'm the one that talks to them, Don. And he said okay, but you'd better make sure you're not going to lead people down the wrong road. And asked what would happen to the guys just starting out. What would happen, would they be fired or, and we explained to them that we weren't sure how that worked but he thought they were put in a new apprenticeship program and receive schooling and a percentage of the journeyman's rate.
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> At one point I told him that we weren't looking to take his job or Denver's job or take the company over, that we were just looking for a fair wage. And he said, "Well do you think it's fair for you to make more money than I do for the job I do?" And he said, "Would you or Kirk like to take my position?" and he said, "Who does the customer call at night when something goes wrong on a job? They call me because I'm the supervisor and I have to take that responsibility, but that's just part of the job and I accept it."
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> Then Kirk replied that he really wasn't interested in taking Don's job or Denver's job or taking over the company. That we were all just looking for a fair wage. And Don said, "Well, you don't have to worry about any hard feelings, because there aren't any. You guys just go to this meeting on Tuesday and ask all the questions that you can. Make sure you know what you're doing."
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> . . . .
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> He [Lyons] was explaining that he felt he was being left out of our union campaign and we told him we didn't mean to leave him out personally, that he was a supervisor and we really didn't think he'd be interested in what the union had to say. And he said, "Of course I'm interested in what the union has to say, but I wasn't even invited to a meeting."
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> And Kirk said, "We'd be more than happy to have you at the meeting next Tuesday evening." And I said, "that's right, the more votes we have on our side the better, and Frank and Denver are more than welcome to come to a meeting any time they like."

[5] Baer used his car to transport employees, including Ed Spertzel, to and from the meetings.

[6] Whether employee Larry Tennis received his card from Collins or Winters does not materially adversely affect Winters' credibility. Winters testified that while he was pretty sure he obtained Tennis' signature when he gave an affidavit to the National Labor Relations Board (Board) agent, in view of Tennis' testimony that he received the card from Collins, Winters was not that sure.

[7] Evidence of record other than Lyons' testimony, R. Exh. 6, demonstrates that this meeting occurred on July 24, and not on July 23, as testified to by Hench and Winters. This mistake, however, does not materially adversely affect their credibility.

. . . .

. . . at one point we were talking about Denver's taking over the company and about the wages we were getting paid. And I said, "So you're saying that when Denver takes over things are going to be better?" And Don said, "No, I can't promise you anything like that, but do you think things will be better if the union comes in?"

And he said, "Like where are we going to get our work? The only contractors we work with are non-union."

And Kirk said, "What about right here, Don? We're the only non-union contractors on the site."

And Don said, "Well, that's pretty much an exception, and even if we do go union we'll just close the doors and start again with three servicemen like we did before."

. . . .

. . . after the conversation we got in contact with Larry Collins and he told us it would be a good idea if we wrote down what went on in the conversation. And I wrote up a rough draft of what I could remember of the conversation and then Kirk and I got together, and Kirk added some things and we corrected some things, and we came up with what you see before you. And I gave it to my wife and she wrote it up so that it was legible.

The Board was supplied with the handwritten summary of the conversation along with a typewritten copy, typed by Collins' secretary.

The day before, July 23, Lyons, while at a jobsite of Respondent in Bethlehem, Pennsylvania, was told by Spertzel that an attempt was being made to organize Respondent's employees.[8] Lyons testified that the next day he asked Hench and Winters if there was any truth in what he heard; that "at the first glance, I seen [sic] some red faces, some change of experience [sic, the word should be expression] that I sort of surprised somebody maybe. But they said yes there is [union] activities"; that he advised Hench and Winters that they were free to investigate the Union and "if there's problems let's bring them back and we can sit around and discuss them and see what we could or couldn't do"; that he asked if certain classifications were involved; and that he stated that Respondent did not work for union contractors which would mean that Respondent would have no business.

Before leaving on vacation on Friday, July 24, Lyons told Tuckey that he heard a rumor about an attempt to organize Respondent's employees and he had spoken to Hench and Winters and "they verified it." Tuckey responded, according to Lyons, ["Y]ou're going on vacation tonight. We'll check it out and see what's happening."[9]

As he left Respondent's facility at the end of the work day on July 24, employee David Helm was told by Tuckey that there was "a rumor going around about some of the guys trying to get the Union in . . . ." Tuckey asked Helm if he had heard anything. Helm had not and he said so. Helm went on to explain to Tuckey that because up until recently he worked in the office, the employees still considered him as part of management and therefore would not confide in him.[10]

Tuckey thought he asked several employees this same question between July 24 and July 31 when he saw the Union's request for recognition, but he could only specifically recall asking Helms. Also, he recalled with respect to the others that he "got no information. Everything was a surprise to everybody that . . . [he] had talked to." Tuckey did not recall asking any of the employees whether they attended any union meetings. Tennis testified that in the middle of July he walked into Lyons' office to fill out his timecard and Tuckey said: "There is a rumor going around about the Union, what do . . . [you] know." Tennis said the only thing he knew was that he "was at a meeting once or twice . . . ."

On Monday, July 27, Baer, who had been transferred from Respondent's commercial department to its residential department, was taken to a job Respondent had at Dickinson College in Carlisle. Helm, who had previously worked the job which involved the Media Center building, had been transferred to another job on the Dickinson College campus in the communication and development building, and he instructed Baer on what had to be done on the Media Center job. Baer testified that when he was given the Media Center job on July 27, Tuckey told him that later he would work on the third job Respondent had on the Dickinson College campus.

The union meeting Winters referred to in the above-described conversation with Lyons was apparently held on Tuesday, July 28, for Helm testified that he attended union meetings and he signed a card on July 28 which Collins gave him. By July 28, 19 of Respondent's 31 pertinent employees had signed authorization cards.[11] In a

[8] According to Lyons, Spertzel told him that one of Respondent's former employees, Danny Ponnicker, was the one who mentioned the union activity.

[9] Tuckey initially testified that Lyons asked him if he knew that the Union has been trying to organize Respondent's employees, and that he told Lyons he knew nothing about it. Lyons testified that the he did not ask Tuckey if he knew about the union activity but rather he told Tuckey about the union activity. Lyons was sure that Tuckey did not say he knew nothing about it. Lyons testified that he did not discuss the union activity with Tuckey on July 23 or on July 24 before he spoke with Hench and Winters. Also, Lyons testified that although, in his opinion, the company would lose 75 percent of its business if it were unionized, he was not that concerned.

[10] During this conversation Helm asked Tuckey "how he [Tuckey] was making out on buying the company, buying the ten-year lease on the company." According to Helm, Tuckey replied that "[since the] union [activity] come up, a big red flag come up and and he's [Tuckey] sort of holding on that until he could find out what was going on." Also, according to Helm, Tuckey said that, if the Company did go union, it would lose about 80 percent of its business to which Helm agreed adding that it might be more than that. Tuckey testified that he thought this conversation occurred on either July 27 or July 28, and that Helms said, "We don't work for union contractors. We get all our work locally. What would happen to our business if we joined the union?" Helm's testimony was very detailed and he impressed me as being a sincere and honest individual. His testimony regarding when this conversation occurred and its content is credited fully.

[11] The parties stipulated to a list of the 31 employees in the unit at that time. Jt. Exh. 1. There were 19 authorization cards received in evidence herein. G.C. Exhs. 3–12, 14–17, 19–21, 24, and 26. All but two of the cards were signed by July 21. The other two were both signed on July 28. Respondent unsuccessfully objected to the introduction of four of the cards. Its objections were not reviewed on brief. Evidence was intro-

Continued

letter dated July 28, forwarded to Frank Black, chairman of the board of Respondent, the Union requested recognition. By petition filed with the Board July 30, the Union requested to be certified as the representative of the employees. (Jt. Exh. 2.)

On Friday, July 31, Tuckey, in response to a note left on his desk, went to Frank Black's office where he was shown for the first time the letter of the Union requesting recognition. Tuckey testified that he was sure this meeting occurred in the afternoon; that he rarely ever saw Black in the morning; and that he did not specifically remember if it was before or after 3:30 p.m., but he thought it was late in the afternoon because Lyons was on vacation and he was out doing Lyons' work much of the day.

Baer testified that on July 31 he:

> . . . came into . . . [Lyons'] office to fill out my time card. Denver asked me, he says, "What's this I hear about you organizing the boys to go union?" I replied, "Are you serious?" He says, "Yes." I said, "Well, where would you hear a thing like that?" He replied he heard it. I didn't want to make conversation at this time and I had some paperwork, additional paperwork, material requisitions to transport to another office, Jim Herley's office. So I left, delivered those papers and came back. Upon returning, I said to Denver, "Well, if this is true what you heard, what is your feeling on it?"
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> He was hesitant a little bit about talking and he did express to me that he didn't think it would work, the people we worked with, the contractors, were of non-union status and that, you know, our customers just didn't want union type working people. There was very little else said.
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> At that time Dave Winters and I think it was Kirk Hench came into the office and I sort of more or less excused myself and left at that time.

Tuckey, who was present throughout the hearing, was asked by one of Respondent's counsel if he heard Baer's testimony regarding the above-described July 31 conversation. Tuckey responded that he had, but when asked whether he had such a conversation on that date, Tuckey responded, "Not to my knowledge, I did not. I don't recall having a conversation with him at that time." As noted supra, Tuckey was not merely an officer of Respondent. When the organizing commenced, he was in the process of attempting to negotiate a long-term lease of the involved business. Apparently the success or failure of the organizing drive would affect Tuckey's plans. Baer impressed me as being a credible witness. His testimony was detailed and he neither evaded nor equivocated. On the other hand, Tuckey did not impress me as being a credible witness. Often his testimony lacked detail and was evasive or equivocal. He conveyed the impression that, instead of responding spontaneously in a candid manner, he would, before responding, weigh the ramifications of each question with respect to the Company's position. When he believed the answer might adversely affect Respondent's position, the response was given in terms of uncertainty. At one point, as treated infra, with the help of one of Respondent's attorneys he set about to impeach his own testimony. Baer's testimony is credited.

While he was working on the communications and development building on the Dickinson College campus the first week of August, Helm was told by Tuckey that "we have a job coming up that we're working on that's right here in Carlisle like I promised you, and I can't give you too many details on it right now." When Helm was relieved of his supervisory position in January 1981, because of the decline in the number of employees in his department, Tuckey assigned him to the residential department in a field position and told him that he would be assigned the next big job that came along.

On Thursday, August 6, Baer was laid off. Tuckey, the first witness called by the General Counsel, testified on the first day of the hearing herein that he made the decision to lay off Baer; that Baer was laid off because Respondent had no other work for him; and that there was no other reason for the layoff. Also, Tuckey testified that he heard a rumor that Baer was involved in the union campaign "[s]ometime during the campaign. I don't know the exact date." Tuckey did not think he heard the rumor about the time Black received the Union's request for recognition, and he was not sure whether he heard the rumor about Baer before he was laid off. But he did hear it before the September 24 election. When asked by General Counsel "[i]sn't it possible that . . . [Baer] was still employed when you heard that rumor about . . . [him]," Tuckey replied, "I am not saying it isn't possible, I don't think it was true—that that is true." Baer's layoff was indefinite vis-a-vis permanent because, according to Tuckey he did not know whether he was going to need Baer again; whether he would call him again.

Baer was working on the media center building at the Dickinson College campus when he was laid off. There was some work to be done on the job, viz, to set in conductors, before Respondent would have to stop working and wait for the general contractor to complete the finishing work before Respondent could hang the fixtures. Tuckey came to the jobsite on the afternoon of August 6 and, as testified to by Baer:

> We went over the job as to its conditions, what was left to be done and so forth. That is when he informed me that he had to lay me off because of lack of work.
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> I was probably a little bit upset at the time and I said to him, "Are you sure—is this the reason I am being laid off? I am not going to be upset if that is

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duced which demonstrates that all save one of the signers read and were aware of what the cards stated, viz, "I desire to be represented by the Harrisburg and Central Pennsylvania Building and Construction Trades Council as my Bargaining Agent in matters of wages, hours, and other conditions of employment." Timothy Heimbaugh's card was sponsored by Hench, who gave Heimbaugh the card, and later received the signed card back from Heimbaugh. Hench did not testify that he saw Heimbaugh sign or read the card. But Hench recognized the signature from personal familiarity with it and the signature matches the unquestionably genuine signature of Heimbaugh on his W-4 form (G.C. Exh. 23). Speitzel, among others, did not sign an authorization card.

the reason but if it is for some other reason then I have the right to be upset."

He assured me again that, you know, that it wasn't that. We talked. I don't know exactly what we talked about for a few minutes there. He did bring up the subject that he had received a letter that we had sent filing for a petition for election. He brought that up that afternoon.

Like I said I was, you know, I was at loose ends probably and we just cut the conversation short. He said I was to come in the next day to turn in the keys, the paperwork, et cetera.

On the last day of the hearing Tuckey was called by Respondent's counsel. Regarding the Baer layoff, Tuckey testified that Baer was temporarily laid off for a couple of weeks in June and, when he was recalled, he was assigned a job for the Giant Food Company with the understanding that Respondent had "no prospects for the future"; that then Baer was transferred from Respondent's commercial department to its residential department because of a lack of large jobs of the type Baer normally handled;[12] that when Baer was transferred and given the job as a mechanic (journeyman) on the media center building he was advised that it was because Respondent had "no prospects for the future"; that when Baer was laid off Tuckey had no reason to believe Baer was engaged in union activities; and that Respondent was pleased with Baer's work performance. On cross-examination Tuckey testified that the decision to lay off Baer was pending probably since July when Baer left the Giant Food Company job and it depended on the amount of work Respondent had.

With respect to the third job at Dickinson College, Tuckey testified that neither he nor anyone else in the Company gave Baer reason to believe that he would be assigned this job. It was described as an extremely minor job, involving only a matter of days work and it was a matter of guessing when "they were going to need anyone." Richard Hockensmith was assigned the job early in the week of August 3.[13] Tuckey testified that the job involved some carpentry work and since Hockensmith spent several years in the house-building business he was, in Tuckey's opinion, better qualified than Baer to do the job.

On redirect the following exchange occurred between Tuckey and one of counsel for Respondent:

Q. Let me show you the personnel files for Richard A. Hockensmith and Charles E. Baer, and ask you to take a look at the wage rates that they were being paid. [Pause]

Q. See if there is any difference between the two gentlemen.

A. Yes there is.

Q. What is the difference?

A. Mr. Baer was receiving $8.40—are you talking about now or at the time?

Q. At the time Mr. Baer was laid off.

A. Okay Mr. Baer was receiving $8.40, Mr. Hockensmith, $7.75. $7.00 prior to his $.75 raise on August 10th.

Q. Were economics ever a consideration in deciding who or what pariticular person should be laid off?

MR. BUCHHEIT: Objection, Your Honor. He's already stated—

JUDGE WEST: Overruled.

THE WITNESS: Well, you know, everything becomes a consideration. Economics are generally involved in who does the smaller residential-type work.

Then on recross the following exchange occurred between Tuckey and General Counsel:

Q. Is it or is it not your testimony that the relative pay of Mr. Baer versus Mr. Hockensmith was the consideration in determining the layoff?

A. Was it a consideration?

Q. Yes.

A. Not a major consideration.

Q. Was it a consideration?

A. At this time I would have to say no, I don't think it was.

Originally all three jobs at the Dickinson College campus were assigned to Helm. They were to be completed by September 1 before the new school year. But since Helm could not complete all three jobs in the involved time frame, other employees had to be assigned to two of the jobs. While Hockensmith was working the third job, Helm asked the superintendent of the residential department, James Herley, for help on the communications and development building job. Herley turned Helm down at that time, indicating "that he was going to have a hard time getting . . . [Hockensmith] to go over to complete the media center job." While he worked on the communications and development building, Helm had different people helping him including Respondent's garage mechanic, Bobby Weitzel. Helm asked Herley and Tuckey for two plumbers to assist him the first week of August, before Baer was laid off. Two plumbers were assigned to assist him the second week of August. In Helm's opinion, Baer was qualified to do the involved plumbing work on the communications and development building. Also, it was Helm's opinion that, since he was originally assigned the third job, Baer was also qualified to handle it.

During the first week in August 1981 Reapsome was transferred from the Bethlehem Leader Nursing Home job to the Carlisle Tire and Rubber Company job.

The second week in August Tuckey came to the communications and development building jobsite and, according to the testimony of Helm:

[Tuckey] pulled me off to the side and said that we got the job over here at the Thornwald Nursing Home and we want, you know, it's going to be for

[12] Baer, a working foreman making over $8 an hour, had worked for Respondent since 1973 (he was laid off in 1974 and returned in 1975) normally handling jobs in the $50,000 to $200,000 range.

[13] Hockensmith was included on the above-described list of people employed on July 28. Apparently he did not sign an authorization card since the General Counsel did not introduce such a card. Before working the third job, he assisted Baer on the media center building job.

> you, and it's right out your back door, and we're going to try to work it so that you can go straight from your home to the jobsite and back in without going into the shop which was a lot closer than the shop was to my place . . . .
>
> And he said the job was approximately 3900 man hours long. And I asked him what he had to do with the job and he said we had the plumbing and the heating and the ventilation and we have a boiler to put in.
>
> . . . .
>
> . . . then he [Tuckey] said, you know how the company feels about the union. Would you talk to some of the employees and explain our point of view to them and tell them how we get our jobs and what our position is on the matter. And I said I would.

Helm further testified that Tuckey brought up the subject of the Union. Also, he testified that, while Tuckey had promised him in January 1981 the next big job, Tuckey did not, at that time, promise him a job in the Carlisle area, less than 2 miles from his house. Helm believed that the assignment constituted a bribe.

Tuckey testified that he believed that Helm was the first to raise the issue of the Union during this conversation; that Helm, after asking how the union campaign was progressing, said something to the effect that "don't these people understand that we work for nonunion contractors and where would we get enough work to keep us busy" and Tuckey replied, "[D]on't tell me, tell others"; and that there was no deal and Helm did not have to do anything in exchange to get the job. Helm's testimony is credited. As indicated supra, Tuckey was not a credible witness. Helm had signed an authorization card on July 28. For him to make the statement attributed to him by Tuckey, Helm would have been acting deceitfully. Helm impressed me as being a candid individual.

On August 10 employee Leonard Witmer received a raise of 75 cents an hour. He had asked for a raise about 4 weeks earlier but was turned down. Initially, Witmer asked his immediate supervisor, Terrance Smith, who spoke with Tuckey. Smith recommended to Tuckey that Witmer not receive a raise until his performance improved. Tuckey went along with the recommendation, and Smith testified that he told Witmer that "it wasn't that long a period of time that I felt he wasn't ready yet for a raise." Also, Smith advised Witmer that he would have to improve his performance. Witmer again asked for a raise 3 or 4 weeks later. Smith and Witmer met with Tuckey. Witmer received the raise. In reply to the question on cross-examination, "Did . . . Witmer's performance improve?" Smith responded, "With improve some." On further cross-examination Smith testified that he did not originally tell Witmer the reason he did not get his raise was "a long enough period of time hadn't taken place" and that he did not so testify on direct.[14] When then asked what Witmer did in the 3- or 4-week period to improve his performance, Smith responded, "I can't recall." And when asked company policy on the size of raises, Smith testified that it was not his decision, and he did not tell Witmer about the raise, "Mr. Tuckey did." Smith conceded that 75 cents an hour was a large raise for that period. But he pointed out that although not specifically broken down, the 75 cents was merit raise plus a cost-of-living raise for 1981. Smith himself received a raise of 30 cents an hour about the time Witmer first asked for the involved raise. Smith did not receive a cost-of-living increase in 1982.

Witmer testified that when he first asked for the raise he spoke with Tuckey who told him that he was not getting a raise because he "wasn't there long enough . . . [he] didn't have a lot of experience"; that Tuckey told him his work was okay; that in late July or August Tuckey called him into his office and, with Smith present, told him that his record had been reviewed and Tuckey was going to give him the raise; and that the largest raise he had received in the past was 50 cents an hour.

Tuckey testified that, when Witmer first asked for the raise, Smith recommended against it and he agreed; that Smith then talked to Witmer; that when Witmer again asked for the raise Witmer asked if he could talk to Tuckey this time; that he did talk to Witmer then and told him he would "do some further review and get back to him in a few days"; that all of the discussions of Witmer's pay raise took place before Tuckey heard rumors about union organizing; and that Witmer received the pay raise because:

> . . . Mr. Witmer had come along and probably gotten increases quicker by far than the average person who works there. At this particular time, when he first asked for the increase, he was working in the service department. Just about the time he asked to talk to me about an increase, he transferred, I think, to the residential department. I'd had another request about this same time from Rich Hockensmith in the residential department requesting an increase, and at the time, both of them had not had an increase since January of '81. Both of the men were going to be working together, both of them were going to be making the same amount of money and so we decided that we would give them an increase. They were given a $.75 increase at that time, told there would be no cost of living increase coming up in the future. That, I'm sure, is why with our declining business, we just couldn't look ahead to a cost of living increase at the end of the year. And since they had requested an increase now they were given $.75 and told that that would be it for the year.

According to Tuckey, it was customary for Respondent to give a cost-of-living increase each year and he made the decision to give Witmer the raise in mid-July; "[t]he files laid on my desk of a week or so before any action was taken on it, but I think they were told, I think their supervisor was told to go ahead and tell them it was

[14] Witmer received his last raise in January 1981.

coming." On cross-examination, Tuckey testified that there was no across-the-board cost of living given in 1981, and that Witmer received a merit increase in August 1981.

Lyons and Hench attended a weekly progress meeting on Tuesday, August 25, at the Carlisle Tire and Rubber Company. Regarding the meeting, the former testified as follows:

> At that meeting, we discussed the problems relating to what we would be doing next week; what we had completed in the past week, and how we keep this project on schedule.
>
> And as we completed this conversation there, and the gentlemen took the minutes and so forth of it, he said, after the meeting, we would like to keep some representative from Frank Black Mechanical Services, a representative from the electrical contractor; and also the contractor from the riggers, at that time. We would like to talk to you after the meeting.
>
> So, at that time, we dispersed—our foremen went back to work, and we had another meeting in there.
>
> . . . .
>
> . . . they told me that due to the lack of work, they were going to lay approximately 120—some employees off, that they wanted to terminate our work as of Friday night [August 28].
>
> And this was a big surprise shock to me.
>
> . . . .
>
> [Since I did not] . . . know about this particular subject before that meeting.
>
> . . . .
>
> After the meeting was over, I went out and got my men together, and told them the news that we were just told inside that job would be terminated as of Friday night, and I was supposed to have everything as complete, as much as I could into Friday night, with the manpower situation that I had.[15]

It was estimated that Respondent had about 1 month's work left to do. At the time, Respondent had three employees on the job, viz, Hench, Winters, and Reapsome. Lyons left the Carlisle Tire and Rubber project, returned to Respondent's facility and, according to his testimony, then informed Tuckey of the situation.

On Friday, August 28, Hench, Winters, and Reapsome were advised by Tuckey and Lyons that they were laid off indefinitely because the Carlisle Tire and Rubber job had been canceled and Respondent had no other work for them at the time.[16] As noted supra, Tuckey knew of the union activity of Hench and Winters on July 24. And, at the first session of the hearing, Tuckey testified that during the course of the campaign he heard a rumor that Reapsome was a union supporter and he probably would have heard the rumor before Reapsome was laid off.[17] But Tuckey testified that the only reason these three were laid off was the above-described reason which he gave to them on August 28. As noted above, Reapsome was transferred from the Bethlehem Leader Nursing Home job to the Carlisle Tire and Rubber Company job in the first week in August. According to Tuckey and Lyons, the transfer occurred so that Respondent could carpool with Hench and Winters.[18] Even though he signed the contract for the job with Carlisle Tire and Rubber Company, Tuckey testified that he did not know in advance that Carlisle Tire and Rubber Company would unilaterally terminate their contract; his first knowledge of that fact came when he received a phone call, he believed, from Lyons immediately after the above-described August 25 meeting at Carlisle Tire and Rubber Company.[19] Tuckey testified that he then called representatives of that Company and was advised that if the contract was not canceled that Company would have to lay off some of its maintenance people which it did not want to do.

Neither Hench nor Winters expected to be laid off. Before August 28, the former had never been laid off in the almost 5-1/2 years he had worked for Respondent. In the late winter of 1981 or the early spring when "things were getting slow" Lyons told Hench that he need not worry, he would not be laid off. During a slow day in the summer of 1980 Winters was sent home early. Lyons told Winters the next day that he "didn't have to worry too much about being sent home because they wanted to keep the welders around in case of an emergency welding job that came up." At that time Winters was not the only full-time welder employed by Respondent. But in August 1981 he was.[20] Reapsome, on the other hand, had been laid off by Respondent prior to August 28. Upon returning in June 1981 from a 6-week layoff, Reapsome, an apprentice plumber, was sent to the Bethlehem Leader Nursing Home job at Allentown,

[15] The minutes, with a date of August 30 (a Sunday), of the August 25 weekly progress meeting were introduced by Respondent as R. Exh. p. 7. On p. 2 thereof, under "Additional Comments" it is stated "Contractors (Aycock and Frank Black) were advised that Carlisle Tire and Rubber Company would like to terminate their contract as of August 28, 1981." At the first session of the hearing herein Lyons testified that he was told at the meeting that Carlisle Tire and Rubber would like to terminate the contract. At the second session Lyons testified that he was not told at the meeting that Carlisle Tire and Ruber would like to terminate the contract but rather that they were terminating the contract.

[16] Neither of the three was offered another job at a reduced wage.

[17] Tuckey's exact testimony was that he "[p]robably [had knowledge of the rumor of Reapsome's union activities prior to his layoff] because that was several weeks later." At the second session of the hearing, Tuckey testified that he was not aware of the fact that Reapsome was allegedly involved with the Union at the time of his layoff.

[18] The three did carpool since they lived close to each other. Hench testified that Respondent occasionally made the effort to assign people to a job based on the location of their residence. And Reapsome testified that the Carlisle job was closer to his residence than the Bethlehem job but, while working on the Bethlehem job, he actually came to Respondent's Carlisle facility and then went to the Bethlehem job with the foreman.

[19] As noted supra, Lyons testified that he returned to Respondent's facility and told Tuckey of the meeting.

[20] Winters performed tasks other than welding but he estimated that 60 percent of the time he welded. Sporadically, he left the Carlisle Tire and Rubber job to do welding elsewhere. Tuckey estimated that Winters welded 80 percent of the time, and that during the period from June 1981 through January 1982 Respondent had enough welding to keep one man busy for 3 months. During the year prior to Winters' layoff Respondent utilized nonemployee welders on eight occasions. Subsequent to Winters' layoff, Respondent's welding was subcontracted and Winters was later recalled to do some welding.

Pennsylvania. Lyons told him that he would be there only a short time but did not tell him where he would be sent.

When Hench and Winters began handling heavy pipe on the Carlisle Tire and Rubber Company job, the former requested additional help. First Merril Markle, who was a second mechanic on jobs, was sent to assist for 1 week. Then Reapsome was transferred during the first week of August to the Carlisle Tire & Rubber Company job, and Markle was transferred to the Bethlehem Leader Nursing Home job.[21]

According to Tuckey it was a

> pure, total coincidence that the four individuals in question who . . . [allegedly were] the four main union supporters in the campaign were the ones that were laid off within a month of the filing of the representation petition.

He asserted that if Baer, Hench, Winters, and Reapsome were the four best employees at Respondent that still would not have saved them from being laid off indefinitely; that only in unusual circumstances would he consider the skill and abilities of the employees before deciding whether to lay them off or someone else in their place; that in this type of a situation it is absolutely the luck of the draw as to who stays and who leaves; and that the involved layoffs were consistent with company policy.

In part, Respondent's Employee Policy and Benefit Book (G.C. Exh. 2) reads as follows:

TERMINATIONS

1. Mechanical Services Company desires the courtesy of two (2) week notice of voluntary terminations.
2. Layoffs are based upon volume of work on hand.
3. Layoffs are not on a basis of seniority but upon employee's capability and potential.
4. Layoffs are authorized as a reprimand for careless mistakes on the part of the employees.

With respect to layoffs, Tuckey testified that in the year prior to July 1981 he could recall only one employee who had 2 years' experience who was laid off and not recalled, namely, a job foreman who had been with Respondent for several years and worked a job after Helm; that this job foreman (Tuckey could not recall his name) was laid off because Respondent did not have any need for him at that time; and that on occasion when he was dissatisfied with an employee rather than terminate that employee he would lay off the employee and at the time, in his own mind, he was sure he would not recall the employee.

Certain of Respondent's employees also testified regarding their understanding of Respondent's policy on layoffs. Helm, formerly a field superintendent, testified that it was Respondent's practice to shift employees to jobs which were finishing up so that when these employees were laid off they would believe it was because of a lack of work. The working foreman laid off in the year prior to July 1981 was specifically identified by Helm who, in fact, laid the individual off at Tuckey's direction not because of a lack of work but rather because Tuckey was not satisfied with the individual's performance. Baer testified that seldom are employees who have 2 years' experience laid off. Rather, Respondent usually, according to Baer, lays off laborers and apprentices and usually when the work force is again expanded new people are hired vis-a-vis recalling those who were laid off. Reapsome testified that while layoffs frequently occur at Respondent, it was not usual for employees with more than 2 years' experience to be laid off, and usually recalled since Respondent when it has to expand its work force generally hires new people.

Respondent employed three or four college students during the summer of 1981. Tuckey testified that he did not know if any of them were laid off without checking his records. Since Tuckey never again spoke to this issue, it must be assumed that Respondent's records do not show that any of these summer employees were, in fact, laid off.

On cross-examination, Tuckey was asked what individuals were laid off from jobs his company completed between July and October 1981. He responded that he did not recall and he would not know without checking Respondent's records. Tuckey did testify that most of the jobs completed during this period were residential jobs which do not run as long as jobs handled by the commercial department.

On September 24 Witmer had to return from a job to Respondent's facility since he was the observer for the Union at the election. At that time Herley, the superintendent of the residential department, was Witmer's supervisor. As credibly testified to by Witmer:

> It was about 20 minutes after two, right before I had to go back to report—to be the observer, and it was in his office. I was in taking off some material off of a blueprint, and that's when—well, Jim [Herley] asked me what I thought about the Union.
>
> I said, "Well, I'm not sure how I think."
>
> And he said, "Well, you must be for it, since you are going to be the observer for the Union."
>
> And I said, "That wasn't really the case, I was doing it so the guy with a family wouldn't have to do it in case the Union would lose; they might lay him off or something like that."
>
> And I then asked him why they laid the four men off—referring to Kirk, Dave, Jed and Chuck.
>
> And Jim [Herley] said that they were troublemakers and that they were for the Union, and that they had to get rid them so they wouldn't be around in another year if there were another election.[22]

[21] Markle was employed by Respondent at the time of the election.

[22] Apparently this means that, as far as Respondent was concerned, it was a foregone conclusion that it would win the September 24 election, and that Respondent was taking that action which it deemed necessary to assure that it would also win any subsequent election. Herley was the second witness called by the General Counsel on the first day of the hearing herein. After laying a foundation, the General Counsel estab-

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On September 24, 29 employees voted. There were 10 who voted for the Union, 15 voted against the Union, and an additional 4 ballots were challenged. Tuckey testified that he challenged the ballots of Baer, Hench, Winters, and Reapsome:

> Because they were not employed there at that present time, because the election was held in the fall of the year which is traditionally our slowdown period, because we were not in a good economic climate and we saw no jobs popping up in front of us that we were going to be able to bring people back to work again in the near future.

According to Tuckey these four men were on indefinite layoff.[23]

The morning after the election Lyons spoke to Gary Nenninger in Lyons' office. The latter testified that Lyons asked him why he voted for the Union, what the Union offered as far as wages, if Nenninger was going into the Union as an insulator or a sheet metal mechanic, and what the major problem was. Nenninger told Lyons that he voted for the Union, that he was interested in sheet metal, and that the major problem was wages. Before this conversation Nenninger had not told anyone in Respondent's management how he voted.

Similarly, Tennis had not told anyone in management how he voted before Lyons interrogated him on September 25. Tennis testified that the morning after the election he was in Lyons' office and Lyons asked him why he voted for the Union. Tennis responded better wages and benefits.

Regarding the day after the election, Helm testified:

> I got into the compound there about twenty minutes after 6:00 in the morning, and I got the company truck and gassed it up and I went inside to fill out the gas report—
>
> . . . .
>
> In Don Lyons' office. And while I was filling it out Don Lyons came over and closed the door and walked over behind his desk and was standing, and he said I know you voted for the union, now I want to know why.
>
> . . . .
>
> I said, you don't know how I voted for the union, nobody does. I said if you and Frank got that impression from the time that you and he went down to talk with Larry and me down at the airport, that was not intended. I didn't say anything because I didn't want anybody to get an impression one way or the other.
>
> And Don said, well most of the votes came from this department. What were some of the promises the union made? What did they have to offer?
>
> And I said they offered a pretty good pension plan, Blue Cross-Blue Shield, which we already have, and there was another benefit there that I can't remember right off the top of my head.
>
> . . . .
>
> He said, well you know the pension plan is paid by you. And I said no I didn't really dig into that that deep. And he said, well, we want to get to the bottom of this. What were some of the other promises they made? And I said Don, they didn't promise us anything that wasn't in their contracts. I said we would have our holidays off without pay. We would be paying for our own vacation and we'd probably lose our uniforms.
>
> I said I'll admit I went to some of the union meetings. In order for me to make a fair vote I have to know both sides of the story and so I had to go to the meetings in order to hear the union's side of the story. I said nobody knows how I voted.
>
> And he said, well, we know the names of some of the people that voted for the union. Ed and Gary and John so forth, and we really want to get to the bottom of this. And I said well what really bothers me was that at the union meetings the company had a representative there that ran back and told the company everything that the union said. I said that was pretty low. I didn't think the company would do a thing like that.
>
> Don said there were finks on both sides. He said after every company meeting, we know who he is and which phone he used, would call the union and tell them everything that was said. I said, well I didn't know about that.
>
> And he said the union really doesn't want you, they want the company. They could care less about you. They want the business that the company has to offer to keep their men busy. And he said even my job is on the line. And that was basically the end of the conversation.

Lyons testified, with respect to the three conversations described above, that he did ask Nenninger what the Union had to offer in benefits, wages, etc. that Respondent does not; that he initiated the conversation with Nenninger; that he did not ask Nenninger how he voted; that he asked Tennis what the Union had to offer the Respondent could not; that he did not ask Tennis why he voted for the Union; that he did speak with Helm; that he closed the door to his office and asked Helm what were the selling points of the Union; that he did not tell Helm he knew how Helm voted nor that most of votes came from his department; that no employees reported

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lished that, after the election, Herley told Witmer that he should consider getting another job, and he suggested the name of an employer. This was all the General Counsel sought to establish on direct. Counsel for Respondent during cross-examination asked Herley whether he, using the language of the complaint, on "or about September 24, which I believe was the day of the election, interrogated an employee concerning said employee's union sympathies." Herley responded, "No." The above-described testimony of Witmer was given on the third day of the hearing herein. Respondent did not subsequently call Herley as its own witness to specifically deny what Witmer testified Herley said about the four laid-off employees. To the extent Herley denied this conversation, his testimony is not credited. In my opinion, Herley was intentionally vague and equivocal. On the other hand, Witmer was forthright. Witmer's testimony is fully credited.

[23] As explained by Tuckey, a man is on indefinite layoff when the company does not really know whether it would need him again; whether it would recall him. Tuckey further testified that since he "did not get a job by the time the election was [held] and did not have a job lined up at that time for them, they were still on indefinite."

to him about what was occurring in the union campaign and he never asked anyone if they attended a union meeting or to keep him informed about union meetings; and that one of Respondent's attorneys had told management there could be another election in a year.

Nenninger, Tennis, and Helm impressed me as being credible witnesses. Lyons suspected that certain individuals voted for the Union and by telling them that he knew who voted for the Union he was able to get two of the three above-described employees to admit that they did indeed vote for the Union. Lyons' methods as well as his manner were deceitful. To the extent that Lyons' testimony conflicts with the testimony of these three employees, it is not credited.

Witmer was also approached by management the day after the election. He credibly testified that on September 25:

> I was at the Fry Communications job in Mechanicsburg. It was the job I was doing, and Jim [Herley] came down in the morning sometime around ten o'clock, approximately and we were talking about the job, and another job that I was going, on, and I asked Jim what was going to happen now, and it was pretty tense.
>
> I am sure he knew what I was talking about.
>
> . . . .
>
> And he said that they were going to get rid of me, and I asked him why, and he said—again, he said that it was obvious that I was for the Union, since I was the observer, and he said that they had a list of the 10 other men that voted yes and that in due time they would be gone also.
>
> I told him that it wasn't fair, and he said, well, the company had to look out for themselves, that they couldn't afford to have them around in case there was another election.
>
> . . . .
>
> Jim said he didn't want to get rid of me because he needed me in the Department, but he said, you know, the final decision wasn't his.[24]

As noted supra, Herley was called as a witness before Witmer testified. And he was not called by Respondent subsequent to Witmer's testimony. Accordingly, Herley did not specifically respond to Witmer's testimony. When examined by Respondent's counsel during the first day of the hearing, Herley did deny certain allegations in the complaint, viz, that on September 25 at the Fry Communications jobsite he threatened an employee with discharge because of the employee's union activity; and that he created an impression of surveillance among employees, that their union activities were under surveillance by informing an employee that Respondent was aware of names of the employees who voted for the Union.[25] Herley was not a credible witness and his denials cannot be credited.

As noted above, on October 1 the Union filed charges in Case 4-CA-12447, and objections to the elections.[26]

During the first week in October, Lyons advised Helm that Respondent was hiring a laborer, Barron Meyers, from the unemployment office. Tuckey testified that Meyers was a laborer hired on a temporary basis at $3.50 an hour to do excavation work at the Thornwald Nursing Home job; and that he did not recall one of the four employees laid off to do this work because it was company policy not to go "to someone who was making mechanic's rate or a higher rate and saying I'll give you a job if you work for $3.50 an hour."

On October 8 Witmer was working at the J. C. Penney Building in Carlisle. He gave the following credible testimony regarding a conversation he had with Herley at this jobsite on the date specified:

> And I was upstairs working in a bathroom I was roughing in, and Jim [Herley] came up and I don't recall exactly how the conversation got started, but he said that he had a job—or a friend that had a company that was looking for help, and he gave me a piece of paper with the name of it on, and I asked him why I'd be interested in that, and he said because Mr. Black was putting pressure on him to get rid of me, and, you know, again, I said that it wasn't right.
>
> And he said, well, he didn't want to but Mr. Black was the boss, and that it was his final decision.[27]

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[24] Witmer testified that Herley said that somebody told Mr. Black to get rid of those who voted for the Union.

Tuckey testified that the Company did not have a list of those who voted for the Union; and that neither he nor any member of management made any attempt to find out who voted for the Union. When asked if he even drew columns on his copy of a list of those who are eligible to vote to indicate who he thought supported the Union Tuckey replied: "I don't know. If I did I did it at home. I didn't do it any place else."

[25] Par. 10(c) of the complaint, which alleges that Herley, at the Fry Communications jobsite, threatened Respondent's employees with discharge because of their union activity, was not specifically denied by Herley.

[26] Originally the objections alleged the following:

1. The Employer engaged in and made material misrepresentation which created and resulted in a coercive and improper atmosphere which interfered with the requisite laboratory conditions for the conduct of a free and fair election.
2. Interrogated employees regarding their Union sympathies.
3. The Employer by its supervisors or agents promised benefits if the employees would go along with the Company by voting no.
4. Created the impression of surveillance of Union activities.
5. Created the impression that it was aware of the employees who had signed authorization cards.
6. Threatened employees with reprisals if they supported the Union.
7. Laid off or discharged the leading Union adherents because of the Union activity.
8. Granted wage increases to the employees.
9. Threatened employees that the Company would close the establishment if the Union won the election.
10. By these and other acts and conduct the Employer prevented and interfered with the conduct of a free and fair election.

As noted in the Report on Objections to Election and Notice of Hearing in Case 4-RC-14796 (G.C. Exh. 1(k)), in the course of the investigation on these objections, Petitioner withdrew Objections 1, 4, 5, 6, 9, and 10.

[27] The piece of paper, which was introduced (G.C. Exh. 27), contains the name of a company, the name of an individual and two telephone numbers. Witmer also testified that Herley said that "somebody told Mr. Black to get rid of the yes votes." Herley denied that portion of the involved complaint which alleges that at the site and on the date specified above he threatened an employee with discharge because of the employee's union activity. According to Herley's testimony, he gave Witmer the

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In October or November 1981 Supervisor Terry Smith took over a job formerly handled by Galen Brenneman on the Dickinson College campus. Respondent had to take the latter off the job because "the people at Dickinson College called . . . [Respondent] and complained because the man . . . [Respondent] had up there [Brenneman] was sitting in his truck reading books and taking a nap every now and then [and Respondent was informed] [t]hat if . . . [it] wanted to continue to do work for . . . [the College, Respondent] would have to remove [the employee]." Brenneman was then sent to work at the Bethlehem jobsite.

As noted supra, the complaint was issued in Case 4–CA–12447 on November 13. A few weeks later Respondent's counsel sent, by certified mail, the following letter, as to Baer, Hench, Winters, and Reapsome:

> We were informed by Frank Black Mechanical Services, Inc. that you had been laid off from your job due to lack of work. At that time of layoff during the latter part of this summer there was no expectation of recall due to poor economic conditions and a lack of new projects.
>
> There are now a few job openings in the Company for mechanics. *This fact is due to the recent obtaining of some new projects.* We are writing you as an authorized representative of Frank Black Mechanical Services, Inc. to inform you of this recall back to work with the Company effective November 30, 1981.
>
> You would be reinstated with the same wage rate and benefit package as you had at the time of your layoff. If you are interested in resuming work with the Company please contact Frank Black Mechanical Services, Inc. within two weeks of the receipt of this letter and advise the Company of your intentions. If the Company does not hear from you within this time, it will conclude that you are not interested in resuming your work with Frank Black Mechanical Services, Inc.
>
> You have already been contacted by telephone by the Company concerning this offer of reinstatement. Should you not wish to return, please notify the Company immediately as it will need to hire other mechanics. [Emphasis added.][28]

When first called by the General Counsel, Tuckey testified that between July 28 and December 1 Respondent hired five employees, either at minimum wage or from a public training program, to work on a low-budget housing project in Carlisle; that it hired only one person who was not a laborer or trainee, viz, Russel Cristy at $5 an hour to do the gas piping on this project; and that he could not recall Respondent hiring anyone else during this period. Later in the hearing, Respondent called Tuckey as its witness. On cross-examination by the General Counsel Tuckey then testified that between the end of September and November 23 Respondent hired eight named individuals and paid them under $4.75 an hour; that Cristy was paid $5.50 an hour; and that Respondent hired specified individuals on specified dates to perform specified tasks at specified salaries, respectively, as follows:

> David Lynch, Sept. 28, plumber, $7 an hour
> Hebert Winger, Nov. 3, plumber, $15.93 an hour[29]
> Galen Brown, Oct. 5, mechanic, $5.25 an hour
> William Barker, July 13, plumber, $5.50[30]

Winters returned to work at Respondent's on December 14 and spent most of the time welding. He was subsequently told that he was being laid off again on January 27, 1982, by Lyons. Regarding the conversation he had with Lyons about the January 27, 1982 layoff, Winters credibly testified as follows:

> Don [Lyons] was saying that they didn't have any more work for me. And I said, well I know there's work at Dave Helm's job. You mean I can't go up there and solder pipe or run sheetmetal or anything? And he explained that those jobs were already filled and said that you guys want to be union, we're going to treat you like you are union.
>
> And then I asked if my layoff was because I was involved in the union, and Don said no, that if we just, if we wanted to be union they were going to treat us like we were union and that's as far as he explained it.[31]

Respondent introduced evidence (R. Exhs. 9, 10, 11(a), and 11(b)) which collectively shows that there was a reduction in the number of field personnel in 1981 beginning in January when Respondent had 62, vis-a-vis 70 in December 1980 and as many as 81 in August 1980, and reaching a low of 32 in September 1981. The number increased to 44 by December 1981. The exhibits also show that Respondent's sales declined in every month of 1981 vis-a-vis the corresponding months of 1980, except for April and July 1981.

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name of the other employer because, in Herley's opinion, Witmer was dissatisfied with his job. On cross-examination beginning, as pertinent, with the question, "[A]re you personally aware of any employee who was threatened, coerced or intimidated by the company at any time," asked by one of the employer's attorneys, the following testimony was eventually elicited from employee Timothy Richwine: Herley told him that "since Mr. Witmer voted for the union or will vote—I am not sure, I don't remember when it was—he should be looking for another job." Herley did not subsequently testify and consequently he did not specifically deny this exchange. Herley was not a credible witness. Witmer's testimony about what Herley said on October 8 is credited.

[28] Tuckey testified that the men were not called back because of new work but rather because additional help was required on existing jobs. Lyons also testified that he was not aware of any new projects, and that Respondent did not normally send certified recall letters.

[29] The $15.93 was a "scale" job. In other words, the job was a public works project and the wage rate was determined by the State of Pennsylvania. Winger was laid off on December 11 for lack of work but he resumed working for Respondent as a laborer at $11.98 an hour at the same scale job.

[30] Baker, a resident of Bethlehem, and possibly Lynch were hired to work on Respondent's Bethlehem Leader job.

[31] Winters prepared an account of this conversation and later submitted it to the Board. Lyons testified that he did not make any statement to Winters on January 27, 1982, to the effect that "if you guys want to be union we are going to treat you like it." Lyons was not a credible witness. Winters was.

III. DISCUSSION AND CONCLUSIONS

Respondent, as discussed infra, committed a number of unfair labor practices within the meaning of the Act, which practices undermined the majority achieved by the Union, vitiated the above-described election, and precluded the possibility of a fair election. Consequently, it is my opinion that this is an appropriate case for a bargaining order.

Collectively the complaint alleges over 25 violations of Section 8(a)(1) and (3) of the Act. It is alleged that Section 8(a)(1) was violated when Lyons conversed for 2 hours with Hench and Winters at the Carlisle Tire and Rubber Company job on July 24[32] in that Lyons asked the two employees about their union activities and the union activities and sympathies of their fellow employees, solicited complaints and grievances thereby impliedly promising increased benefits and improved terms and conditions of employment, and threatened that Respondent would close its doors if a union was selected. As noted above, in its answer to the complaint, Respondent admits that Lyons interrogated Hench and Winters about their union activities. But with respect to the union activities and sympathies of fellow employees, Respondent admits only that Lyons "made inquiries as to the general nature of the union activity [and sympathies] of fellow employees . . . [Lyons] did not inquire as to the activities [or sympathies] of any specific fellow employee." (G.C. Exh. 1(e).) The General Counsel argues that Lyons' "general" questions about union sympathies among classifications of Respondent's employees were in reality very specific questioning as to who was in favor of the Union in that at that time Respondent employed two sheetmetal workers and one electrician;[33] that Lyons admitted that he unlawfully solicited grievances; that the credible evidence of record demonstrates that Lyons threatened to close Respondent's facility and start over with three employees; and that even Lyons' own testimony shows that his prediction of a loss of business was a thinly veiled plant closure statement that was not based on any objective facts explained to employees.

In asking who supported the union by job description, Lyons was asking Hench and Winters about the union sympathies of at least one specific fellow employee, viz, the election. In view of Lyons' subsequent conduct of September 25, and in view of other credible evidence of record, Respondent wanted to know specifically who was supporting the Union. Lyons asked the question in such a way that he could obtain specific information. He did not ask simply if most of the employees supported the Union. Rather, he asked by job descriptions so that if Hench and Winters said yes when he asked about the electrician he would know who it was and if they said yes about the sheetmetal workers he would know specifically who they were. Possibly, he expected Hench and Winters to name the individuals in the job descriptions but when they did not he did not press them on this. Instead of asking a general question, Lyons asked a question which encouraged a specific response and in at least one case, the electrician, left no alternative but to give a specific response. Lyons was not simply attempting to gauge union support. In persisting in finding out who was the union representative among Respondent's employees, and in view of his failure to limit his questioning on this subject to Hench and Winters, Lyons, albeit he did not specifically name other employees, was in fact asking which employee, including employees other than Winters and Hench, was the union representative. In other words, Lyons was asking a question which may or may not have involved the union activities of Hench's and Winters' fellow employees.

Unlike the situations in *K & K Gourmet Meats*, 245 NLRB 1331 (1979), enfd. in part 640 F.2d 460 (3d Cir. 1981), and *Visador Co.*, 245 NLRB 508 (1979), Lyons did not merely indicate that he would be willing to listen to the employees' problems. After establishing that there was an organizing drive, Lyons asked Hench and Winters, "aren't you satisfied with what we give you?" When he was told that Winters wanted more money and Hench was interested in the Union's schooling and pension plan, Lyons asked if there were other grievances. Respondent did not show that it had a past practice of soliciting employee grievances or complaints. The equitable distribution of scale jobs was said by Lyons to be a scheduling problem. Impliedly, therefore, this was something management could correct. This was a meeting of two employees with a management official, Lyons, at which "gripes" were aired. As such it falls into the category of conduct found to be unlawful in *Reliance Electric Co.*, 191 NLRB 44 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

Lyons' statement that Respondent would close its doors if it was unionized was another violation of the Act for this prediction was not based, and Hench and Winters were not advised that it was based, on objective facts which conveyed Lyons' belief as to demonstrable probable consequences beyond Respondent's control *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). As alleged and as set forth above, Respondent violated Section 8(a)(1) of the Act during this interrogation of Hench and Winters by Lyons.[34]

As alleged in the complaint and, as Tuckey admitted, he asked Helm on July 24 if he had heard anything about the attempt of some of the employees to bring a union in. Tuckey's use of the work "rumor" was meaningless. Lyons had already verified with Hench and Winters that

[32] The complaint states on or about July 23.

[33] The General Counsel also submits, on brief, that at that time Respondent also employed only one welder. In view of the fact that Winters was the one full-time welder and since Winters had already conceded his union sympathy earlier in this conversation, there was no apparent need to, and Lyons apparently would not, have to inquire as to how the welder felt about the Union. Lyons testified, however, that he asked if the "welders" were involved. Although Winters was the only full-time welder, Respondent did have other employees who welded but not on a full-time basis. One of them, Speitzel, was the individual who told Lyons about the organizing attempt.

[34] Lyons' statement to Hench and Winters that they did not have to worry about any hard feelings and that they should go to the union meeting must be viewed in the light (a) of Lyons' statement that he was not pleased that Hench and Winers had been "sneaking behind his back," and (b) of Lyons' persistence in finding out which of Respondent's employees was the union representative. When viewed in this light Lyons' statement was not really an assurance that no reprisals would be taken if they supported the Union.

indeed an organizing drive was under way. And Tuckey had been informed of this. By posing the same question to Tennis, which elicited an admission that the latter had attended one or two union meetings, Tuckey again violated Section 8(a)(1) of the Act.

One day after the Union filed its petition for certification and on the same day that Tuckey was shown the Union's request for recognition based on a card majority, Tuckey interrogated Baer about the latter's attempt to organize "the boys to go Union." Tuckey managed to get Baer to state "[w]ell, if this is true . . . what is your feeling on it." This interrogation violated Section 8(a)(1) of the Act.

Baer was laid off 6 days later. Hench, Winters, and Reapsome were laid off 3 weeks after that. The complaint alleges that these employees were discharged because of their union activity. Tuckey testified that the four were laid off indefinitely due to a lack of work, and it was a "pure, total coincidence" that these four were the ones who were laid off "within a month of the filing of the representation petition." The General Counsel points out that Supervisor Herley admitted to Witmer on September 24 that Respondent had gotten rid of these four employees because they were troublemakers, they were for the Union, and Respondent needed to protect itself. Aside from this admission, the General Counsel asserts, the evidence establishes that the true motivation for the layoffs was these employees' union activity in that (1) Lyons acknowledged to Helm in September that Respondent was receiving information on the employees' union activities from an employee; (2) Respondent virtually never terminates employees that it is dissatisfied with, but rather typically lays them off; (3) these four layoffs were not consistent with company policy as established in Respondent's personnel manual; (4) Tuckey's testimony that, even if these four were the Company's best employees, they would have been laid off is incredible and inconsistent with any reasonable business practice; (5) these four employees all worked at least 2 years for Respondent and at that time Respondent seldom laid off employees with this much seniority. [Of the four only Baer had previously been indefinitely laid off (in 1974), and this apparently was over some misunderstanding]; (6) while there may have been some decrease in the amount of work Respondent did in the summer of 1981 vis-a-vis other recent years, the decrease was not nearly as dramatic as Respondent's exhibits depict, in view of the fact that the exhibits did not reflect the severance of L. B. Sheet Metal from Respondent in the spring of 1981—a fact brought out on cross-examination; (7) even assuming arguendo that the sudden loss of the Carlisle Tire and Rubber Company job necessitated a brief temporary layoff of Hench, Winters, and Reapsome until work assignments could be restructured, its serves as absolutely no explanation for why the three were indefinitely laid off with no expectation of recall; and (8) the alleged need to lay off these employees is directly rebutted by the fact that Respondent hired three new employees into high paid skilled positions during the involved period. The Union makes some of these same arguments, and contends that because Respondent's layoffs were typically permanent it stands to reason that Respondent would carefully select those to be released since any other course would be simply a slow form of economic suicide. Additionally, the Union asserts that "the numerous other violations of the Act . . . all support, circumstantially, the existence of a committed effort by Respondent to repel the Union challenge . . . ." (Union's Br. pp. 24 and 25.) Citing *Wright Line*, 251 NLRB 1083 (1980). Respondent argues that it has demonstrated that there was a legitimate business reason for these layoffs and the General Counsel has failed to meet his burden of showing that the discharges were discriminatory.

Wright Line, supra, is not applicable here. The business justifications cited by Respondent are nothing but pretexts. Viewed in isolation, the business decline and the unilateral termination may have justified some layoffs. But the persuasiveness of Respondent's contention is undermined by prior and subsequent events, i.e., Respondent's coercive interrogation of three of the four who were laid off, Tuckey's knowing before the layoff that the four supported the Union,[35] the fact that Respondent did hire additional personnel after these four were laid off, apparently Respondent had other work to which these four could have been assigned, the fact that even though accused of misconduct Brenneman was sent to the Bethlehem jobsite after these four were laid off and before they were recalled in December 1981, and the recall letters which gave a false reason for the recall. Additionally, as pointed out by the General Counsel and the Union, when one takes into consideration what would be not only good but, indeed, reasonable business practices for a company of this size, there is no explanation for Respondent's conduct except for the union activity of the four employees. And, if this is not sufficient, there remains Herley's undenied admission that these four employees were gotten rid of because they were "troublemakers." Finally, if there were sufficient business justification at the time of the layoffs one must wonder why Respondent and its attorney believed it was necessary to suggest an inoperative post hoc rationalization at the trial itself for the layoff of Baer. All things considered, the layoffs of Baer, Hench, Winters, and Reapsome were in violation of Section 8(a)(1) and (3) of the Act.

The complaint alleges that in mid-August 1981, Respondent violated the Act when it improved Helm's conditions of employment by assigning him to a job near his residence and by allowing him to report directly to the jobsite, rather than reporting to Respondent's facility, and, at the same time, requested Helm to attempt to discourage other employees from supporting the Union. On brief, the General Counsel argues that the clear implication was that Helm was receiving a favor and in return he should speak negatively to other employees about the Union. Citing *Triana Industries*, 245 NLRB 1258, 1263

[35] As noted supra, Baer's testimony that Tuckey asked him about his union activities is credited. Tuckey's incredible testimony about whether he knew Reapsome supported the Union before the layoff, when considered in the light of Lyons' concession that Respondent had a "fink," leads me to conclude that Tuckey did indeed know Reapsome supported the Union before Reapsome was laid off. Additionally the fact that the involved unit was small supports an inference of Respondent's knowledge of Reapsome's union organizing activity. *A to Z Portion Meats*, 238 NLRB 643 (1978).

(1979), the General Counsel contends that where, as here, an employer promises improved working conditions in the context of a discussion in which the employer asks the employee to dissuade others from supporting the union, there can be little question but that the improvement was motivated by the union campaign and is in violation of the Act. The Union, on brief, argues:

> Helm correctly understood the sudden job assignment as a *quid pro quo*; in return for the favorable working conditions he was to talk to the rank and file against the Union [Tr. 287]. Thus, Respondent attempted to infringe not only on his freedom of choice but on that of the remaining employees as well.[36] [Emphasis added.]

Respondent contends that it has fully negated any presumption of illegality in that Helm's job assignment was decided on long before the union election and it was in complete and full accord with well-established company policy to, whenever possible, assign employees to jobs near their homes. While the job assignment alone might not have been a violation of the Act, Tuckey's simultaneous request that Helm attempt to dissuade others from supporting the Union, which was an attempt to coerce Helm, made the assignment a violation of Section 8(a)(1) and (3) of the Act. Although an employer may lawfully ask employees to vote against a union, it is a violation of Section 8(a)(1) for the employer to make the same request of other employees. *Federal Stainless Sink Div. of Unarco*, 197 NLRB 489, 500 (1972). Respondent's attempted coercion violated Section 8(a)(1) of the Act.

Paragraph 11 of the complaint alleges that Witmer's August 10 raise violates the Act. On brief, the General Counsel contends that Tuckey decided to reverse his recently taken position and give Witmer the raise after Lyons was informed during his July 24 interrogation of Hench and Winters that wages were one of the major "gripes." Assertedly, this is why Witmer received the raise of 75 cents more an hour, a sum which Respondent apparently had not previously given to any other employee. It is argued by the General Counsel that there is no credible explanation for either the timing or the amount of the raise. Tuckey's assertions to the contrary are described by the General Counsel as being nothing more than self-serving and unconvincing. The Union argues that the raise was unlawful because its purpose was reasonably calculated to have the effect of influencing the employee's freedom of choice. It is Respondent's position, on brief, that "with the exception of the timing of the effect of the actual increase, all discussions and decisions with respect to the raise were prior to mid-July, 1981." Respondent's brief page 22. In other words, Respondent contends that not only was the raise in conformance with company policy but that "the decision to grant Witmer's increase . . . [was made] prior to the company receiving actual notice of the union's demand for recognition." Id. In view of Respondent's union animus, the fact that it failed to demonstrate that a raise of this size had previously been granted to any employee, Smith's inability to recall how Witmer improved his performance within a few weeks subsequent to being originally turned down, and the fact that no credible evidence of record demonstrates that Witmer was advised prior to July 24 that he had received the raise, it must be concluded that the raise was granted for the purpose of undermining union support, and, therefore, was in violation of Section 8(a)(3) of the Act.

It is alleged in the complaint that on the day of the election, September 24, Respondent, through Herley, unlawfully interrogated Witmer concerning his union sympathies. The General Counsel contends, on brief, that Supervisor Herley's questioning of Witmer about what he thought of the Union and Herley's statement "well you must be for it, since you are going to be the observer for the Union" constitute interrogation in violation of Section 8(a)(1) of the Act. Respondent disagrees, arguing on brief that if, in fact, the conversation took place, it was general and innocuous, nothing more than idle chatter or small talk between friends. The questioning occurred during the business day, in a supervisor's office, just before the election. Witmer's credited testimony that, during the conversation, he explained to Herley that he was going to be the observer so that a family man would not have to run the risk of being laid off in retaliation, and that Herley stated that the four above-described layoffs occurred because these employees were troublemakers and supported the Union belie Respondent's assertion. The questioning constituted interrogation in violation of Section 8(a)(1) of the Act.

Respondent committed a number of serious unfair labor practices from the time the Union obtained a majority, requested recognition, and filed its petition on July 30 requesting certification, up to the time of the election.[37] As noted supra, the Union filed objections to the election citing acts of Respondent found above to be unfair labor practices. It follows, therefore, that the objections have been established. Respondent's preelection 8(a)(1) and (3) violations of the Act substantially interfered with the laboratory conditions under which elections for a collective-bargaining representative must be conducted. In view of the fact that Respondent's acts interfered with the employees' freedom of choice, the election conducted in Case 4–RC–14796 on September 24 must be set aside.

Respondent's unfair labor practices did not stop with the election for, the morning after, Respondent's vice president Lyons, as alleged in the complaint, unlawfully interrogated Nenninger and Tennis about their union sympathies. When he asked them why they had voted for the Union, neither had previously told management how they voted. That same morning, Lyons told Helm that Respondent knew Helm voted for the Union and it

[36] Union's Br. p. 26. Helm did not believe that he had to speak negatively about the Union to obtain the job near his residence. But, as indicated above, he did believe the job was a "bribe."

[37] While the July 1981 interrogations of Hench, Winters, Helm, and Tennis occurred before recognition was requested and the petition was filed, these violations occurred after a majority was obtained, and in any event may be considered for their cumulative effect in determining whether to set the election aside. *United Oil Mfg. Co. v. NLRB*, 672 F.2d 1208, 1212 (3d Cir. 1982), and *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 519 (3d Cir. 1981).

wanted know why. As alleged in the complaint, during this exchange Lyons unlawfully interrogated Helm about his union sympathies, and about the union activities of Respondent's employees. Also, Lyons unlawfully created an impression of surveillance by advising Helm that Respondent was aware of the names of the employees who voted for the Union.

Additionally, on the day after the election, Supervisor Herley, as alleged in the complaint, unlawfully threatened Witmer with discharge for his union activities, unlawfully created an impression of surveillance by telling Witmer that Respondent had a list of the other men who voted for the Union, and unlawfully threatened that the men on the list would be discharged. Someone had told Black to get rid of those who voted for the Union and Herley told Witmer that Respondent had to look out for itself, it could not afford to have prounion employees around in case there was another election. Thirteen days later Herley, as alleged in the complaint, unlawfully threatened Witmer with discharge because of his union activities when Herley gave Witmer the name of another employer and informed Witmer that Black was putting pressure on Herley to get rid of Witmer.

So, even subsequent to the election, Respondent violated Section 8(a)(1) of the Act with four of its employees in the manner described above. Its purpose was to identify the remaining union supporters and, as indicated by Herley, get rid of them before the next election, if there was one. Subsequent unfair labor practices can be considered in determining whether to impose a bargaining order. *Hedstrom Co. v. NLRB*, 629 F.2d 305, 311 (3d Cir. 1980).

Respondent admits the allegations in the complaint that about July 28 the Union requested recognition and Respondent refused to grant it. On brief, the General Counsel contends that Respondent has violated Section 8(a)(5) of the Act in that Respondent refused to recognize a union which had obtained signed authorization cards from a majority of its employees in an appropriate unit, and then embarked on a course of conduct designed to undermine the Union's majority status and make a fair election impossible. It is argued by the General Counsel that the circumstances surrounding Respondent's unfair labor practices indicate that they were likely to have both a severe and long-term impact on unit employees; that the fact that the president and vice president of the Company, along with Herley, participated, indicates that the violations were part of a general campaign to destroy employee support for the Union; and that the unfair labor practices involved include a number of those considered most serious by the Board, i.e., a threat to close, the discharging of employees for their union activity, and the unlawful solicitation of grievances and the conferral of benefits.

The Union argues, on brief, that out of 30 eligible voters, Respondent's conduct affected at least 9 employees, viz, Baer, Hench, Winters, and Reapsome, who were discharged; Witmer, who was threatened with discharge; Helm, who was both bribed and threatened; Nenninger and Tennis, who were explicitly accused of being union voters; and Richwine, who was unequivocally informed that Respondent would retaliate against an employee by discharging him for his union support. The Union also argues that the central figures in Respondent's unlawful conduct were two chief officers in the management hierarchy, its president and prospective owner, and its vice president. It contends the employer's conduct created a psychological impact on all of the employees that is unlikely to dissipate because Respondent's violations did not cease with its victory in the election. Instead, Respondent placed employees on notice that it knew who the union supporters were, and they would not be around if there was another election. Under the circumstances, the Union contends, the traditional remedies employed by the Board would not erase the effects of Respondent's conduct and a subsequent, fair election would be impossible. Instead, the Union argues that employee sentiment evidenced in the authorization cards should be given effect, and a bargaining order should be issued.

Respondent, on brief, argues that its acts, even if wrongful, did not affect a significant percentage of its employees, the effects of the acts can be dissipated by the imposition of traditional Board remedies, and no wrongful act was "taken" by a senior company official during the "critical period."

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), affirmed the Board's authority to issue a bargaining order where a union majority is established by cards and the nature and extent of the employer's unfair labor practices render unlikely a free choice by the employees in a Board election (referred to as a *Gissel II* order).

Respondent's violations were widespread. Their continuation, even after the election, was a statement by the Company of its position with respect to any possible subsequent election. The Respondent expected to win the September 24 election and, by unlawful means, it did. By its postelection conduct, Respondent was placing employees in this small unit on notice that those who supported the Union, including union election observer Witmer, would not be around anymore. Respondent was demonstrating that its proclivity to exceed the limits of the law would continue as long as it believed that it was being threatened with unionization. Its president and vice president committed a number of unfair labor practices before the election and its vice president continued his unlawful conduct after the election in his attempt to unlawfully identify the union supporters. Additionally, union observer Witmer was put on notice that the owner of the Company was going to get rid of those who voted for the Union and this was the reason Witmer was being threatened with discharge. As pointed out by the Union, a significant number of eligible voters were directly affected by Respondent's unlawful conduct. Also, in a unit as small as the one at hand, undoubtedly most, if not all, of the employees were aware of Respondent's above-described conduct. It is my opinion that, in the situation at hand, merely ordering Respondent to refrain from future violations would not erase the effects of Respondent's unlawful acts from the memories of its employees. Based on what I observed and heard at the hearing, it is my opinion that not only is the possibility of a fair rerun

election slight, it is almost, if not in fact, nonexistent. *NLRB v. Permanent Label Corp.*, supra.

By refusing to recognize and bargain with the Union, as requested and instead engaging in the course of unlawful conduct which undermined the Union's majority status and prevented the holding of a fair election, Respondent violated Section 8(a)(5) of the Act. *Trading Port, Inc.*, 219 NLRB 298 (1975). Its bargaining obligation arose on July 28, 1981, the date of the Union's demand, inasmuch as the Union by then had achieved majority status and Respondent commenced its clear course of unlawful conduct even before that date.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) of the Act:

(a) On more than one occasion, interrogating employees about their union activities and sympathies.

(b) On more than one occasion, interrogating employees about the union activities of Respondent's employees.

(c) Requesting an employee to attempt to discourage other employees from supporting the Union.

(d) Soliciting employee complaints and grievances and thereby impliedly promising its employees increased benefits and improved terms and conditions of employment.

(e) Threatening employees that Respondent would close its doors if the employees selected the Union as their collective-bargaining agent.

(f) Interrogating employees regarding the union sympathies of their fellow employees.

(g) On more than one occasion, creating an impression of surveillance among Respondent's employees that their union activities were under surveillance by informing employees that Respondent was aware of the names of the employees who voted for the Union.

(h) On more than one occasion, threatening an employee with discharge because of his union activities.

(i) Threatening its employees with discharge because of their union activities.

4. By engaging in the following conduct Respondent committed unfair labor practices contrary to the provisions of Section 8(a)(1) and (3) of the Act:

(a) Increasing the benefits of its employee Leonard Witmer by granting him a wage increase to discourage interest in and support of the Union.

(b) Improving the conditions of employment for its employee David Helm by assigning him a job near his residence while, at the same time, asking him to dissuade his fellow employees from supporting the Union.

(c) Laying off Charles Baer on August 6, 1981, and Kirk Hench, Jed Reapsome, and Davis Winters on August 28, 1981, because of their union activity and to discourage employees' interest and membership in the Union.

5. By refusing to recognize and bargain with the Union as representative of a majority of the employees as requested on July 28, 1981, but instead engaging in the commission of those preelection practices described above, Respondent undermined the majority in the unit of employees that the Union represented, and made impossible the holding of a fair representation election. Respondent's refusal to bargain and embarking upon this course of misconduct constituted an unfair labor practice in violation of Section 8(a)(5) of the Act.

6. The described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Respondent's preelection unfair labor practices nullified the results of the September 24, 1981 representation election, and these unfair labor practices cannot be corrected by conventional remedies, including a rerun election, in view of the fact that, in the situation at hand, it is not possible to have a fair rerun election. Accordingly, it is appropriate and necessary that Respondent be ordered to bargain with the Union as of July 28, 1981, when the Union attained a majority and requested the Respondent to recognize it.

THE REMEDY

Having found that Respondent has engaged in a number of unfair labor practices and that the objection to the election should be sustained, I shall recommend that Respondent be ordered to cease and desist from committing these unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

It will be recommended that Respondent give backpay to Charles Baer, Kirk Hench, Jed Reapsome, and Davis Winters for their unlawful layoffs which commenced on above-specified dates in August 1981, and continued until they were recalled in December 1981, said backpay to be computed on the basis set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).[38]

It shall also be recommended that Respondent recognize and bargain with the Union on request and embody any understanding reached into a signed agreement.

In view of the degree and pervasiveness of the unfair labor practices, a broad cease-and-desist order shall be recommended precluding Respondent from "in any manner" interfering with, coercing, or restraining employees in the exercise of their rights guaranteed by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Frank Black Mechanical Services, of Carlisle, Pennsylvania, its officers, agents, successors, and assigns, shall

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[38] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Coercively interrogating employees about their union activities and sympathies.

(b) Coercively interrogating employees about the union activities and sympathies of their fellow employees.

(c) Coercively attempting to induce an employee to attempt to discourage other employees from supporting the Union.

(d) Soliciting employee complaints and greivances and thereby impliedly promising its employees increased benefits and improved terms and conditions of employment.

(e) Threatening employees that Respondent would close its doors if the employees selected the Union as their collective-bargaining agent.

(f) Creating an impression of surveillance among Respondent's employees that their union activities were under surveillance by informing employees that Respondent was aware of the names of the employees who voted for the Union.

(g) Threatening its employees with discharge because of their union activity.

(h) Granting raises or improving the conditions of employment of its employees to dissuade them from supporting the Union.

(i) Laying off employees because of their union activity and to discourage employees' interest and membership in the Union.

(j) Refusing, on request, to bargain with the Union as the exclusive bargaining representative of the unit of Respondent's employees described in footnote 3 of the decision.

(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.[40]

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Harrisburg and Central Pennsylvania Building and Construction Trades Council as the exclusive collective-bargaining representative of all employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment and, if agreement is reached, embody such agreement in a written signed contract.

(b) Make employee Charles Baer whole, in the manner set forth in the section of the decision entitled "The Remedy," for any loss incurred as a result of his unlawful layoff from August 6, 1981, to his recall in December 1981, and in the same manner make employees Kirk Hench, Jed Reapsome, and Davis Winters whole for the loss of earnings incurred by each as a result of their unlawful layoffs from August 28, 1981, to the time they were recalled in December 1981.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at Carlisle, Pennsylvania, facility copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election conducted in Case 4–RC–14796 be set aside.

[40] Respondent's unfair labor practices in this matter are so egregious and demonstrate such proclivity to violate the Act that broad injunctive relief is appropriate. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[41] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."